FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

April 26, 2005

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WILLIAM LEE MUSGROVE, Debtor.	BAP No. EO-05-002
WILLIAM LEE MUSGROVE, Appellant, v. LINDA DAVIS, and WILLIAM MARK BONNEY, Trustee, Appellees.	Bankr. No. 03-73331 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before McFEELEY, Chief Judge, NUGENT, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The Chapter 13 debtor appeals an Order entered by the United States Bankruptcy Court for the Eastern District of Oklahoma refusing to afford the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

debtor relief from an earlier Order entered by that court incorporating the terms of a stipulation between the debtor and his former spouse, Linda Davis (Davis), related to a divorce-related debt. The bankruptcy court is AFFIRMED.

I. BACKGROUND

In 1977, the debtor and Davis married, and in April, 1978, their only child was born. They divorced pursuant to a Decree of Divorce filed by an Oklahoma court in 1982. The Decree of Divorce granted Davis custody of the child, and required the debtor to pay Davis $100.00 per month as child support during the child's minority.

The debtor failed to pay Davis child support. Davis commenced an action against the debtor in a Texas court, seeking to collect the child support debt (Collection Action). On July 2, 2003, the Texas court entered a notation in the Collection Action docket, awarding Davis child support arrears, pre-judgment and post-judgment interest, and attorney's fees and costs.

On August 25, 2003, prior to entry of a Judgment in the Collection Action, the debtor filed a Chapter 13 petition in the Eastern District of Oklahoma. In October, 2003, Davis filed a "Motion for Cumulative Judgment of Child Support Arrears," in the bankruptcy case, asserting, in relevant part, a claim against the debtor for child support arrearages (First Motion). The debtor objected to the First Motion. Davis responded to the debtor's Objections, and simultaneously filed an amendment to the First Motion (Amended Motion). In the Amended Motion, Davis asserted that in addition to prepetition child support arrearages, her claim against the debtor included interest, and attorney's fees and costs. The debtor objected to the Amended Motion.

The bankruptcy court scheduled an evidentiary hearing on the Amended Motion. Davis and the debtor filed a Joint Motion to continue the scheduled hearing, representing that they were attempting to determine if the matter could be settled. The bankruptcy court granted the Joint Motion, and the hearing was

rescheduled. In the meantime, Davis filed a "Corrected and Supplemented Amended Motion," further increasing the amount of her claim against the debtor.

At the rescheduled hearing, appearances were made by counsel of record for the debtor and Davis. Both counsel represented to the bankruptcy court that the parties had reached an agreement regarding Davis's claim against the debtor, and Davis's counsel submitted a proposed order setting forth the terms of the agreement. The bankruptcy court did not execute the proposed order at the hearing because it contained provisions allowing Davis fees in the event of appeal, and it did not require the debtor to amend his Chapter 13 plan to incorporate the stipulated claim. The proposed order was modified with the bankruptcy court's comments, and then it was filed with the court, after having been "[a]pproved as to Form, Substance and Stipulated to"[1] by all counsel, including debtor's counsel (Stipulated Order).

The bankruptcy court executed and entered the Stipulated Order on January 8, 2004. It provides, in relevant part, that Davis is allowed "a priority claim in the amount of $55,825.72 as of August 25, 2003 consisting of $40,947.22 in child support arrears (including accrued interest), $11,500.00 attorney fees . . . and costs of $66.00."[2]

The debtor did not file a notice of appeal from the Stipulated Order within ten days of it being entered.[3] In June, 2004, the debtor's case was dismissed.[4] Subsequently, in October, 2004, the Texas court made the following minute entry

---

[1] Order at 4, in Appellant's Appendix at 17.

[2] Stipulated Order at 1, in Appellant's Appendix at 14.

[3] *See* Fed. R. Bankr. P. 8002(a).

[4] The bankruptcy court entered an order dismissing the debtor's Chapter 13 case on June 25, 2004, after the debtor failed to appear at a hearing on the confirmation of his contested Chapter 13 plan. Although the case was dismissed, it was not closed. *See* 11 U.S.C. § 350(a)

in the Collection Action: "Court finds that money judgment granted in bankruptcy court is res judicata."[5]

On November 17, 2004, the debtor, now appearing *pro se*, filed a motion seeking relief from the Stipulated Order (Rehearing Motion). The debtor questioned the bankruptcy court's jurisdiction to determine child support. In addition, he stated that he did not understand how the Stipulated Order was "created" and why it was not "dismissed when the Bankruptcy was dismissed."[6] Davis objected to the Rehearing Motion, and the debtor subsequently filed a "Motion to Vacate," which is not included in our record.

The bankruptcy court entered an Order denying the Rehearing Motion (Rehearing Order), holding that the debtor failed to set forth sufficient grounds under Federal Rule of Civil Procedure 60(b) to set the Stipulated Order aside.[7]

This appeal followed.

II. DISCUSSION

The debtor expressly states in his Notice of Appeal that he appeals the Rehearing Order. In addition, although not specifically stated, the text of and the attachments to the Notice of Appeal indicate the debtor's intent to appeal the Stipulated Order.[8] For the reasons stated, we do not have jurisdiction to review the Stipulated Order, and the Rehearing Order is affirmed.

---

[5] Debtor's Motion for Dismissal, Exhibit A at 2, in Appellant's Appendix at 32.

[6] Dismissal Motion at 1, in Appellant's Appendix at 30.

[7] Fed. R. Civ. P. 60(b) is made applicable in bankruptcy cases by Fed. R. Bankr. P. 9024.

[8] *See Smith v. Barry*, 502 U.S. 244, 245 (1992).

1. This Court does not have jurisdiction to review the Stipulated Order

This Court has jurisdiction to review an order or judgment that is "final" within the meaning of 28 U.S.C. § 158(a)(1) only if a notice of appeal is timely filed.[9] Federal Rule of Bankruptcy Procedure 8002(a) states that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the . . . order . . . appealed from."[10] A motion for relief under Federal Rule of Civil Procedure 60(b), such as the Rehearing Motion in this case, tolls that ten day period, but only "if the motion is filed no later than 10 days after the entry of judgment."[11]

The Stipulated Order, which sets forth the parties' stipulation as to the allowance, priority and amount of Davis's claim against the debtor, was "final" when it was entered by the bankruptcy court on January 8, 2004.[12] Under Bankruptcy Rule 8002(a), therefore, the debtor was required to file a notice of appeal within ten days of January 8, 2004. The debtor did not do so. Furthermore, because the Rehearing Motion was filed almost eleven months after the Stipulated Order was entered, the ten-day period was not tolled. Accordingly, this Court does not have jurisdiction to review the Stipulated Order.

2. The bankruptcy court did not abuse its discretion in entering the Rehearing Order

Unlike the Stipulated Order, we have jurisdiction to review the Rehearing

---

[9] *See, e.g.*, *Dimeff v. Good (In re Good)*, 281 B.R. 689 (10th Cir. BAP 2002) (citing cases).

[10] Fed. R. Bankr. P. 8002(a).

[11] *Id.* 8002(b)(4) & 9024.

[12] *See, e.g.*, *In re Geneva Steel Co.*, 260 B.R. 517, 520 (10th Cir. BAP 2001) (order resolving an objection to claim and setting priority of claim is a final order under 28 U.S.C. § 158(a)(1)), *aff'd*, 281 F.3d 1173 (10th Cir. 2002) (order subordinating claim is a final order).

Order. It is a final order from which the debtor filed a timely notice of appeal.[13] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the District Court for the Eastern District of Oklahoma.[14] Furthermore, this appeal of the Rehearing Order is not moot as a result of dismissal of the debtor's Chapter 13 case because the Stipulated Order–the Order from which the debtor seeks relief–was not vacated when the case was dismissed.[15] Accordingly, if we were to hold that the bankruptcy court erred in refusing to set the Stipulated Order aside (which we do not), we could render effective relief.[16]

The Rehearing Order was entered pursuant to Federal Rule of Civil Procedure 60(b). It is not argued, nor could it be, that the bankruptcy court erred as a matter of law in applying Rule 60(b). The only issue, therefore, is whether the bankruptcy court abused its discretion in refusing to afford the debtor relief from the Stipulated Order.[17] A trial court abuses its discretion only if "the appellate court has a definite and firm conviction that [it] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[18] Applying this standard of review, we affirm the Rehearing Order.

---

[13] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a); *see, e.g., Stouffer v. Reynolds*, 168 F.3d 1155, 1172 (10th Cir. 1999) (order pursuant to Fed. R. Civ. P. 60(b) is a final order).

[14] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

[15] 11 U.S.C. § 349.

[16] *See, e.g.*, *In re Armstrong*, 292 B.R. 678, 685-86 (10th Cir. BAP 2003) (citing cases).

[17] *See, e.g.*, *Good*, 281 B.R. at 699 (citing *Elsken v. Network Multi-Family Sec. Corp.*, 49 F.3d 1470, 1476 (10th Cir. 1995); *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)) (orders entered pursuant to Rule 60(b) are reviewed for abuse of discretion).

[18] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation and quotation marks omitted).

Rule 60(b) states that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.[19]

Relief under Rule 60(b) is afforded only in exceptional circumstances.[20]

The bankruptcy court refused to set aside the Stipulated Order based on its conclusion that the debtor failed establish any grounds for relief under Rule 60(b). We agree. None of the grounds for setting aside a final order stated in Rule 60(b) was established by the debtor below and, therefore, the Rehearing Order is affirmed.

The debtor's primary argument on appeal is that the bankruptcy court erred in refusing to vacate the Stipulated Order because the debtor did not authorize his attorney to enter into the agreement set forth therein. Assuming that lack of authority to settle Davis's claim is a basis on which to set the Stipulated Order aside under Rule 60(b),[21] the bankruptcy court did not err in denying the Rehearing Motion because the debtor did not present any evidence that his attorney acted without his consent. The Court of Appeals for the Tenth Circuit has stated:

> The law is settled that an attorney of record may not compromise,

---

[19] Fed. R. Civ. P. 60(b).

[20] *See, e.g., State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996); *Good*, 281 B.R. at 699.

[21] *See, e.g., Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966) (party sought to set order aside under Rule 60(b) where attorney allegedly compromised claim without client's consent).

> settle, or consent to a final disposition of his client's case without express authority. However, this general principle must be considered in connection with the rule that an attorney of record is presumed to have authority to compromise and settle litigation of his client, and a judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof by the party seeking to vacate the judgment that the attorney had no right to consent to its entry.[22]

Accordingly, the bankruptcy court did not err in presuming that the debtor's attorney, who was undisputably the debtor's counsel of record at all times relative to the Stipulated Order, had authority from the debtor to settle Davis's claim, and absent evidence rebutting the presumption of authority, it did not err in refusing to set the Stipulation Order aside.

In conjunction with his argument that his attorney lacked authority to settle Davis's claim, the debtor asserts that he has a malpractice claim against the attorney. We do not address that allegation because it is not properly before us. Any malpractice claim that the debtor believes he has against the attorney must be pursued by commencing an action against the attorney in an appropriate forum.

The debtor also states that Davis's attorneys "have fabricated evidence to deceive the bankruptcy court" in order to obtain funds from the Chapter 13 trustee.[23] While fraud, misrepresentation, or misconduct by an adverse party are grounds to set an order aside under Rule 60(b)(3), the bankruptcy court did not err in refusing to apply it in this case because the debtor did not present any evidence supporting his allegations to the bankruptcy court. Furthermore, the

---

[22] *Id.* (citations omitted); *accord Hayes v. Eagle-Pitcher Indus., Inc.*, 513 F.2d 892, 893 (10th Cir. 1975) (attorney does not have authority to settle absent client consent, and any presumption of authority is "rebutted easily" by the party questioning it), *quoted in Federal Deposit Ins. Corp. v. Oaklawn Apts.*, 959 F.2d 170, 175 (10th Cir. 1992); *see Yahola Sand & Gravel Co. v. Marx*, 358 P.2d 366, 372 (Okla. 1960) (an attorney has no power to compromise a claim without express consent, but the client ratifies his attorney's acts "if he does not disavow it the first moment he receives knowledge that his attorney has transcended his authority.") (quoting *Yarnall v. Yorkshire Worsted Mills*, 87 A.2d 192, 193 (Pa. 1952)).

[23] Appellant's Brief at 17.

debtor does not claim that the Stipulated Order was procured by the misconduct of Davis's attorneys; but, rather that they are now engaging in some type of misconduct to obtain funds from the trustee. Such allegations are not grounds for setting the Stipulated Order aside under Rule 60(b).

Additionally, the debtor challenges the bankruptcy court's jurisdiction to enter the Stipulated Order. While an order entered by a court lacking subject matter jurisdiction over a matter may be set aside under Rule 60(b)(4) as "void," the debtor's arguments are without merit because the bankruptcy court had jurisdiction to enter the Stipulated Order.[24]

Finally, the debtor states that the rate of interest on Davis's claim allowed in the Stipulated Order is not appropriate as a matter of law. We cannot address this argument because it is an attack of the Stipulated Order, which is now final and not subject to appeal.

III. CONCLUSION

The bankruptcy court's Rehearing Order is AFFIRMED.

[24] 11 U.S.C. §§ 502(b) & 507; 28 U.S.C. §§ 157(b)(1), (2)(A)-(B) & 1334(b); Fed. R. Bankr. P. 9019.